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Supreme Court of the United States

October Term, 1975.

No. 75-1150

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal From the Supreme Court of the State of New Jersey.

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Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY AND RICHARD J. SULLIVAN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY,

Appellees.

—

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

—

REPLY BRIEF OF APPELLANTS.

SUMMARY OF ARGUMENT.

P. L. 1973, *C.* 363 does not prohibit disposal of solid and liquid waste by land disposal alone, but prevents entry of all solid and liquid wastes for any purpose whatsoever. An unconstitutional statute cannot be saved by a regulation adopted under it. No basis exists to remove land disposal from the purview of the Commerce Clause. The New Jersey Supreme Court could not reasonably find that the entry of solid or liquid waste into New Jersey or its treatment, processing, storage or disposal therein, posed a material threat to the public health or environmental quality. Rational local planning for solid waste disposal can be accomplished without prohibition upon entry.

ARGUMENT.

The Arguments Presented by Appellees and by Vermont and New Hampshire as *Amici Curiae* Do Not Justify the Statutory Prohibition Against Entry Into New Jersey of Solid and Liquid Wastes Originating Out-of-State.

In their respective briefs, Appellees and the States of Vermont and New Hampshire as *amici curiae* treat *P. L.* 1973, *c.* 363 as if it prohibits the disposal of solid and liquid waste by landfill alone. So too, the New Jersey Supreme Court finds that the objective of the Statute is ". . . to prolong the useful lifespan of landfill areas within the State . . . ." (A248). That is manifestly not the case. *P. L.* 1973, *c.* 363 completely prohibits *every* form of storage, treatment, utilization processing and final disposal by a simple, but thoroughly effective expedient: it bans entry—

> *No person shall bring into this State* any solid or liquid waste which originated or was collected outside the territorial limits of the State . . . . (Emphasis added.)

Neither the remaining regulative statutory language,[1] nor the "emergency" regulation promulgated pursuant

1. Entry is prohibited until the Commissioner of the Department of Environmental Protection ". . . has promulgated regulations *permitting and regulating* the treatment and disposal of such waste in this State". (Emphasis added.) It is curious that the sole "regulation" adopted by the Commissioner under this statute permits entry of certain specified wastes for designated purposes but entirely ignores the regulation of same. *N. J. A. C.* 7:1-4 (A92). It is also significant that *N. J. A. C.* 7:1-4 reaffirms the statutory ban upon *entry* of all solid and liquid wastes for any purpose.

thereto[2] (A92) is limited to land disposal, but relate, in general terms, to every form of treatment and disposal.[3]

The New Jersey Supreme Court conceded that the statute, on its face, prohibits the movement in interstate commerce of even those types of solid and liquid waste which it found to be merchantable (A240). It held, however, that the regulation issued in response to the legislation had a "confining effect" upon the unlimited exclusion mandated by the statute (A240):

> We, therefore, agree with the decision below, insofar as the HMDC regulations are concerned, that they cannot be sustained on the theory that no item of interstate commerce is involved, as these regulations do really attempt to exclude from the HMD even those types of wastes which may have some potentiality of useful renewal.
>
> *The amendments to the Waste Control Act,* N. J. S. A. 13:1I-9 and 13:1I-10, *totally banning the disposal of solid waste originating out-of-state, also fail to make any provision for excepting those types of solid waste which may be renewed. Nevertheless,* as we have pointed out, *the DEP regulations,* issued in response to this legislation, do *except from the ban* on out-of-state refuse *those types of solid waste which may have a value for recycling or for use as fuel.* In view of the confining effect of this latter regulation, it is clear that an argument challenging the validity of the Waste Control Act on Commerce Clause grounds, unlike the argument challenging the HMDC regulations, cannot be premised on the existence here of 'merchantable' items or legitimate 'articles of trade', as those wastes which can be put to effective use are explicitly excepted from the ban (A239-240). (Emphasis added).

Although the New Jersey Supreme Court characterized *N. J. A. C.* 7:1-4 as having a "confining effect" upon *P. L.* 1973, *c.* 363, its decision did not, as Appellees suggest (Appellees brief, p. 32, n. 7), have the effect of construing the statute. There was no need for the Court to engage in the interpretative process since the statute was clear and unambiguous and not susceptible to different meanings. *N. J. A. C.* 7:1-4 represented no more than an implementation of the plainly expressed legislative intent: entry of specified solid and liquid wastes for limited purposes was permitted by the Commissioner of the Department of Environmental Protection consistent with the power grant to him by the statute.[4] An absolute, unlimited embargo remained upon entry of said wastes for every other purpose, and upon entry of other solid and liquid wastes for any purpose whatsoever.

A grant of regulatory authority empowers an administrative officer to carry into effect the will of the legislature as expressed in the statute. *Dixon v. United States,*

2. That regulation, which was adopted under *P. L.* 1973, *c.* 363 *two weeks prior to its effective date,* provides, in pertinent part, as follows:

> No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State.
>
> • • •

N. J. A. C. 7:1-4

3. The New Jersey Rules of the Bureau of Solid Waste Management, *N. J. A. C.* 7:26-1 *et seq.*, define "disposal" as "The storage, treatment, utilization, processing, or final disposition of solid waste." *N. J. A. C.* 7:26-1.4.20. A substantively identical definition is contained in the Solid Waste Management Act, *N. J. S. A.* 13:1E-3c.

4. As noted by the New Jersey Supreme Court, "The HMDC regulations are broadly drawn to exclude all solid wastes collected or originating out-of-state, while the Waste Control Act, *through the promulgation of regulations by DEP, has in effects been amended* to exclude only that refuse which has no value either for fuel or recycling purposes." (A237, emphasis added).

318 *U. S.* 68, 74 (1965). But an unconstitutional statute does not confer regulatory power at all. Speaking for an unanimous Court in *Norton v. Shelby County,* 118 *U. S.* 425, 442 (1886), Mr. Justice Field observed:

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

See also *Huntington v. Worthen,* 120 *U. S.* 97, 101-102 (1887); *Chicago, I & L. R. Co. v. Hackett,* 228 *U. S.* 559, 566 (1913). If an unconstitutional act "confers no rights" and "creates no office", then it certainly grants no power to an administrative officer to adopt a regulation which, by its confining effect, would constitutionalize an otherwise unconstitutional statute. The act must stand or fall on its own merits.

In addressing the question of evenhandedness, Vermont and New Hampshire candidly acknowledge ". . . that the New Jersey statute discriminates between New Jersey-source garbage and refuse and the out-of-state product" (*Amici* brief, p. 19). But they argue that a State, in its discretion, may take landfills out of commerce altogether in order to extend their life expectancy (*Amici* brief, pp. 4-5, 19) even though land sites themselves may be articles in commerce (*Amici* brief, p. 5). Understandably, no citational authority is offered to support this novel position, which was not argued below and is raised here for the very first time.

Amici contend that ". . . the threat to the life expectancy of sanitary landfills . . ." and not the intrinsic threat posed by garbage, is at issue in this case (*Amici* brief, pp. 4-5).[5] "The landfill potential of a state", they argue, "is

5. It already has been pointed out that *P. L.* 1973, *c.* 363 does not prohibit land disposal alone, but bans entry for any purpose.

a resource, just as water, oil, coal or any other commodity is a resource" (*Amici* brief, p. 5). But the Court should not apply Commerce Clause analysis to the area of solid waste disposal because ". . . the resource of open and available landfill space is so closely related to the provision of necessary government services that the Commerce Clause analysis is inapplicable" (*Amici* brief, p. 5).[6]

Oklahoma v. Kansas Nat. Gas Co., 221 *U. S.* 229 (1911) and *Penna. v. West Virginia,* 262 *U. S.* 553 (1923)[7] are dispositive of *Amici's* argument. In the latter case suits were brought by Pennsylvania and Ohio to enjoin West Virginia from enforcing a statute intended, through regulation of pipe line companies, to compel the retention within West Virginia of all natural gas there produced that might be required for local needs. West Virginia argued, in support of the legislation, that pipe line companies were engaged in a *quasi*-public business, and that the waning supply of natural gas was no longer sufficient to satisfy both local and extra-territorial needs. The legislation was characterized as a legitimate measure of conservation, and essential to provide heat to the residents of West Virginia during the winter months.

Notwithstanding these arguments, the statute was found to contravene the commerce clause: "If the situation

6. *Amici* view electricity, fuel, water, hospitals, schools and police facilities, together with solid waste disposal facilities, as ". . . a part of the amenities state or local governments provide directly or regulate closely" (*Amici* brief, p. 9). Electricity, *FPC v. Florida Power & Light Co.,* 404 *U. S.* 453, 458 (1972), fuel, *Penna. v. West Virginia,* 262 *U. S.* 553 (1923), water, *City of Altus v. Carr,* 255 *F. Supp.* 828 (W. D. Tex. 1966) aff'd *per curiam* 385 *U. S.* 35 (1966), and hospitals, *Hospital Building Co. v. Trustees of Rex Hospital,* — *U. S.* — (1976), may all be engaged in interstate commerce.

7. See also *City of Altus v. Carr,* 255 *F. Supp.* 828 (W. D. Tex. 1966), aff'd *per curiam* 385 *U. S.* 35 (1966). *Hudson County Water Co. v. McCarter,* 209 *U. S.* 349 (1908), upon which *Amici* rely, was for all practical purposes limited to its facts by this Court in *Oklahoma v. Kansas Nat. Gas Co.,* 221 *U. S., supra,* at 258-260.

be as stated, it affords no ground for the assumption by the State of power to regulate interstate commerce, which is what the act attempts to do. That power is lodged elsewhere". *Penna. v. West Virginia*, 262 *U. S. supra*, at 598.

Although a governmental unit may establish reasonable land use and resource conservation regulations, it may not limit the application of same to a designated class of persons. If, for example, a privately owned power company was operated on privately owned property zoned for such use, a state could not decree that the facility terminate its service to out-of-state customers. The state could not impose such a ban even if there was not enough electricity available to handle the demands of its own residents.

Amici attempt to avoid this conclusion by arguing that ". . . New Jersey is no more obligated to provide landfill space to serve the needs of local Pennsylvania governments and their citizens than it is to provide places for Pennsylvania pupils in their schools or police protection to Pennsylvania towns" (*Amici* brief, pp. 9-10). The problem with this reasoning is that New Jersey is not providing landfill space: the land is owned by private enterprise engaged in a legitimate, highly regulated business. If the State chooses to condemn and pay for sanitary landfill property in order to enter the market itself, and then restrict its trade to its own citizens or businesses within the State, a different question might be presented, *Hughes v. Alexandria Scrap Corp.*, — *U. S.* — (1976). But that is not the question presented here.

In *Hughes*, decided subsequent to the submission of Appellant's brief, this Court reaffirmed the fundamental principle that a State may not interfere ". . . with the natural functioning of the interstate market either through prohibition or through burdensome regulation", *Hughes v. Alexandria Scrap Corp.*, — *U. S.*, *supra*, slip sheet opinion at 11). If the statute considered in *Hughes* had prohibited

the flow of automobile hulks into Maryland for processing or disposal, or regulated the condition under which it may occur (slip sheet opinion, p. 11) then the statute presumably would have fallen. Yet that is precisely the effect of *P. L.* 1973, *c.* 363 in the instant case: it prohibits the entry into New Jersey of automobile hulks for any purpose whatsoever.[8]

Just as the "raw material" of the scrap metal processor includes automobile hulks, an incineration plant, a liquid waste processing facility, a composting plant, and a sanitary landfill require a sufficient volume of solid and liquid waste to maintain their economic feasibility (A93, 271, 281-282); see also *P. L.* 1975, *c.* 326, § 3 amending *N. J. S. A.* 13:1E-2c. This fact was graphically, but incongruously, admitted by Appellees who argued that the State may prohibit the transportation of articles which are inherently dangerous to public health (Appellees brief, pp. 17-18), while they simultaneously permitted the entry, without further regulation, of hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid waste to protect the economic survival of treatment and processing facilities (A93). Certain types of refuse which may be unmerchantable for other purposes represent an article of commerce in the waste collection, treatment, processing or disposal context. The established course of interstate business attests to that fact.

A State has the unquestionable power to protect the health and safety of its people. *Dean Milk Co. v. Madison*, 340 *U. S.* 349, 354 (1951). It may pass reasonable regulations to accomplish that end. But it may not prohibit the interstate transportation and disposal of solid and liquid

8. Auto bodies are specifically included within the definition "bulky waste" in the Rules of the Bureau of Solid Waste Management, *N. J. A. C.* 7:26-1.4.3. Neither *P. L.* 1973, *c.* 363 nor the "emergency" regulation adopted pursuant thereto, would permit the entry of same. See also *N. J. A. C.* 7:26-1.4.20 which includes "processing" within the definition of disposal.

waste when such drastic measures are concededly unnecessary to protect public health and environmental quality (Appellants brief, p. 47; A109). The local interest has all the protection that it needs without imposing undue discriminatory burdens on interstate commerce. As averred by the Deputy Assistant Administrator for Solid Waste Management Programs, United States Environmental Protection Agency:

> . . . It is EPA policy that no municipality or State should take action to prevent the free flow of waste across municipal or state boundaries provided the transport, processing, and disposition of the waste is in accordance with the provisions of applicable federal and state environmental and land use laws, guidelines, regulations and recognized engineering practices. (A59)

Appellees seek to support the judgment of the New Jersey Supreme Court by maintaining that its findings ". . . are solidly grounded on the Basis and Background Statement of the New Jersey Department of Environmental Protection, quoted in the Counterstatement of the Case, and the report of the State of New Jersey County and Municipal Government Commission, entitled *Solid Waste: A Coordinated Approach* (1972), of which judicial notice was taken by the Supreme Court of New Jersey (App. 233)." (Appellees' brief, p. 23).

The problem with this analysis is that the Basis and Background Statement referred to by Appellees and incorporated in their brief (Appellees' brief, pp. 4-10) [9] was based upon information and belief (A72) and not upon personal knowledge as required by the Rules Governing

9. The entire "Basis and Background Statement" is reprinted at A73 *et seq.*

the Courts of the State of New Jersey, R. 1:6-6. In addition, Appellants challenged the validity of certain critical conclusions reached in the report entitled *Solid Waste: A Coordinated Approach* (A274). Despite more than ample time to respond, this challenge has never been refuted by Appellees.

Even if the Basis and Background Statement is properly relied upon, it does not support the conclusion reached by the New Jersey Supreme Court. The Statement was intended to provide the rationale for the proposed Rules of the Bureau of Solid Waste Management. Upon the adoption of said Rules on June 28, 1974 (A128), the Commissioner of the Department of Environmental Protection commented that they afforded ". . . far greater protection to the lands and waters of . . . [the] State [of New Jersey]" [10] (A127), than did the State Sanitary Code which, according to the *New Jersey Solid Waste Management Plan* published by the Department (A74), already assured ". . . nuisance-free operation of disposal sites in conformance with good practice and health standards" (Appellants' brief, p. 52). If this were not enough, the Principal Environmental Engineer of the Bureau of Solid Waste Management admitted that the Bureau's proposed Rules were ". . . adequate to protect the public health, safety and welfare or the quality of the environment" (A109).

Problems commonly associated with land disposal were identified by the Basis and Background Statement

10. Particular attention was directed to problems associated with gas generation and ground water contamination. See Appellants brief, pp. 54-56. The Department of Environmental Protection acknowledged that information supplied under the Rules should be sufficient ". . . to assess the potential of a proposed sanitary landfill to pollute the ground or surface waters" (A80). Gas control measures and venting were also required as a condition of operation (A81-82).

and systematically controlled by the Rules in order to protect the public health and environmental quality. This is consistent with the legislative direction to the Department of Environmental Protection to ". . . formulate comprehensive policies for the conservation of the natural resources of the State, the promotion of environmental protection and the prevention of pollution of the environment of the State" *N. J. S. A.* 13:1D-9.

Although the question was not raised below and should not be considered by the Court, Vermont and New Hampshire infer that use of disposal facilities in New Jersey for solid waste collected outside the State would somehow defeat rational local planning (*Amici* brief, pp. 11, 17). Nothing could be further from the truth. *N. J. A. C.* 7:26-2.5.25 and *N. J. A. C.* 7:26-2.5.26 require the maintenance of records revealing the quantity of solid waste accepted for disposal. By monitoring quantity, the life expectancy of disposal facilities may easily be computed and future alternatives planned well in advance of anticipated need.

It is not responsive to assert that "more rapid filling of landfills than planned may mean short-run profits for the operators and long-term costs for the communities that prematurely will require alternative sites for solid waste disposal or will have to curtail or alter planning for growth" (*Amici* brief, p. 11). Commercial enterprises engage in business to make a profit.[11] That is the basis of the American economic system. If local government desires to achieve greater control over cost, then it should itself purchase a disposal facility and limit the usage thereof to its own constituents, if it can do so without violating state or federal law. It is one thing to say that a state may regulate price, and quite another to maintain that it may control

11. This profit margin is controlled by the New Jersey Department of Public Utilities, *N. J. S. A.* 48:13A-1 *et seq.*

prices *and* customers. Such regulation goes far beyond a legitimate local purpose.

CONCLUSION.

Based upon the aforesaid argument, and the arguments set forth in the Brief of Appellants heretofore filed with this Court, it is respectfully urged, in order of preference, and in the alternative, (1) that the judgment of the New Jersey Supreme Court be reversed and *P. L.* 1973, *c.* 363 be declared unconstitutional on the ground that same directly burdens and discriminates against interstate commerce; or (2) that the judgment of the New Jersey Supreme Court be reversed, and the matter remanded to the trial court for a hearing on the factual issues raised by the Commerce Clause questions, provided, however, that this Court retain jurisdiction and continue the stay of judgment heretofore granted pending a final determination of the matter by this Court on its merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

We hereby certify that on this 26th day of October, 1976, three copies of the Reply Brief of Appellants were mailed, with adequate first class postage prepaid: to Assistant Attorney General Stephen Skillman, at his office located in the State House Annex, Trenton, New Jersey, 08625; to William C. Brashares and Paul M. Laurenza, Cladouhos & Brashares, attorneys for *amicus curiae*, National Solid Wastes Management Association, at their law office located at 1750 New York Avenue, N.W., Washington, D. C. 20006; to Louis L. Meier Jr., attorney for *amicus curiae*, American Society of Civil Engineers, at his law office located at 1625 Eye Street, N.W., Washington, D. C. 20006; to David H. Souter, Attorney General, attorney for the State of New Hampshire, *amicus curiae*, at his office located in the State House Annex, Concord, New Hampshire 03301; and to M. Jerome Diamond, Attorney General, attorney for the State of Vermont, *amicus curiae*, at his office located in the Pavilion Office Building, Montpelier, Vermont, 05602.

We further certify that all parties required to be served have been served.

By _____
HERBERT F. MOORE

By _____
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